1-17-2008

Schoger v. State Appellant's Brief Dckt. 35917

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHEY MARIE SCHOGER,

Petitioner/Appellant,

vs.

STATE OF IDAHO,

Respondent/Respondent.

S.Ct. No. 33976

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE JOEL D. HORTON,
District Judge

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A. Nature of the Case

This is an appeal from an order denying Appellant Shey Schoger's petition for post-conviction relief pursuant to a state's motion for summary dismissal. Clerk's Record (CR) 60, 62.

B. Procedural History and Statement of Facts

On May 11, 2004, Shey Schoger was charged by indictment with trafficking in methamphetamine (400 grams or more), possession of a controlled substance (marijuana) with intent to deliver, and possession of a controlled substance (psilocybin and/or psilocyn) with intent to deliver. CR 49.

On October 7, 2004, the parties reached a plea agreement wherein Ms. Schoger would enter a guilty plea to trafficking in methamphetamine (200 grams or more) and the state would recommend a fixed sentence no greater than the five-year mandatory minimum, with an unspecified indeterminate term to follow, and the imposition of a $15,000 mandatory minimum fine. CR 50.

A plea hearing was held. The District Court began by explaining its understanding of the agreement, explaining penalties and rights waived, and determining that Ms. Schoger was not under the influence of drugs or alcohol, had discussed the case with her attorney and various other standard preliminary matters. Tr. 10/7/04 p. 106-111 at CR 23-23A. The Court then stated:

> Well, Ms. Schoger, based upon what you've told me, then, I find you understand the charge. I find that you understand the potential consequences of your decision to plead guilty. I find that your plea of guilty is a voluntary decision. And finally,

that you committed the crime of trafficking in methamphetamine in a quantity greater than 200 grams.

Tr. 10/7/04 p. 111 at CR 23A.

The Court then stated that it wished to ask a couple of follow up questions beginning with the question of how Ms. Schoger possessed the methamphetamine. Ms. Schoger told the Court that she had 56 grams on her person and possessed other methamphetamine in a bedroom at a house. Tr. 10/7/04 p. 111-112 at CR 23A.

The Court asked if Ms. Schoger had the intention to "exercise control over [the methamphetamine] in some fashion, to move it around or do something with it at a later time." Tr. 10/7/04 p. 112 at CR 23A.

Ms. Schoger discussed this question with counsel and counsel stated that Mr. Davis was the primary person who handled the methamphetamine and that it was basically hidden from her, but that she lived in the house and strongly believed that the state could prove constructive possession if the case went to trial. Counsel stated, "And so with regard to the quantity that is within the house, Ms. Schoger admits to constructively possessing that and would ask the court to continue to proceed forward with her plea in terms of the 200 grams or more." Tr. 10/7/04 p. 112-113 at CR 23A and 24.

The Court then told counsel that it was asking the questions of Ms. Schoger and that it was concerned about apparent reticence on her part. The following transpired:

Court: So you can just tell me right now, did you know it was there or did you only possess 56 grams that you told me about at first?

Ms. Schoger: Yes. Yes. It was in the house and –

Court: And you knew about it?

Ms. Schoger: I didn't know, I didn't know that much, but I knew there was some in there.

Court: Did you have the intention to exercise control over it?

Ms. Schoger: No.

Court: Okay. May I have a list of the state's witnesses?

Tr. p. 114 at CR 24.

Defense counsel then immediately asked the court to take the plea as an *Alford* plea.[1] The Court responded:

The short answer is no, and I'll tell you why, Mr. Barnum.

By this plea of guilty, she gives up her right to appeal the decision on the suppression hearing.

What she has just told me here is a defense, is a factual innocence assertion as to the charge. It's one thing to enter an *Alford* plea under true *Alford* circumstances, which was, 'I don't recall,' whether it be a function of mental illness, whether it be a function of voluntary consumption of alcohol, or other items. But an *Alford* plea, in my view, is not an appropriate mechanism for a defendant to say, 'I didn't commit the crime, but I wish to avail myself of a plea offer in this case.'

The reason we have jury trials is to assess guilt or innocence, and this is precisely a case where I think it would be an abuse of my responsibilities to afford the defendant her constitutional right to have a guilt or innocence determination rather than extracting a plea of guilty under the threat of increased consequences..

She's told me that she did not commit the crime to which she would have pled under the information.

Tr. 10/7/04 p. 115 at CR 24.

A trial followed at which Ms. Schoger was found guilty of trafficking in methamphetamine (400 grams or more) and the lesser included misdemeanor charge of

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[1] *North Carolina v. Alford,* 400 U.S. 25, 91 S. Ct.160 (1970).

possession of a controlled substance (psilocybin and/or psilcyn). She was sentenced to 15 years, a mandatory minimum term of 10 years followed by an indeterminate term of five years. She was also fined the mandatory amount of $25,000. CR 50-51.

Ms. Schoger filed an appeal wherein the suppression issue the District Court was concerned about was not raised. The only issue raised was that her sentence was excessive, notwithstanding that the Court was required by statute to impose the ten-year mandatory minimum term. The Court of Appeals denied relief in a single page unpublished per curiam decision. *State v. Schoger,* 2006 Unpublished Opinion No. 399, CR 3.

Ms. Schoger thereafter filed a *pro se* petition for post-conviction relief raising the issue of ineffective assistance of counsel insofar as counsel did not explain to her the elements of the charge to which she would be pleading thus leading her to be confused during the plea hearing and ultimately leading the Court to refuse her plea. In particular, in her affidavit, Ms. Schoger stated:

> . . . The judge was informed that an agreement had been reached on a plea bargain. Judge Horton asked me if I was ready to enter a plea of guilty and I had stated that yes I was. Judge Horton then asked me a series of questions that I was not expecting. When he asked me if I was in possession of 200 grams but no more than 400 grams I looked at my attorney in confusion because I was unsure of the answer. I then stated no. The judge then asked me what I was in possession of and I told him 52 grams. After a lot of confusion and me looking at my attorney for some sort of answers, Judge Horton wouldn't let me enter a plea of guilty and said that this case was proceeding to trial. After Judge Horton recessed I looked at my attorney and had asked him what went wrong and why did I have to go to trial. He stated that it was because I didn't say that I was in possession of 200 grams or not more than 400 grams. I looked at him and said I wasn't in possession of that. I told the judge what I was in possession of. I was very confused and upset because I didn't understand what was happening. Mr. Barnum then explained to me the word possession. He said that what you know is considered the same as what is actually on your person. You do not necessarily have to have it in your possession. I looked at him and asked why none of this

> had been explained to me. I had never experienced such serious charges with so much different details in it. Going through this, I relied on my attorney and put my trust and confidence in his ability that he would make sure that I knew what was happening. I strongly feel that if I had been explained the process of entering a plea and what would be expected to be asked by the judge that I would be serving a sentence that had been offered by the state and would not have had to proceed to trial and received the sentence of a min/mandatory of 10 years.

CR 8-9.

Counsel was appointed and an amended petition was filed. The amended petition raised three claims for relief: 1) that trial counsel was ineffective in explaining the elements of the charge to Ms. Schoger resulting in the court's rejection of her guilty plea; 2) that the District Court abused its discretion in rejecting the guilty plea either on the facts as tendered or as an *Alford* plea; and 3) that appellate counsel was ineffective in failing to raise the issue of whether the District Court erred in rejecting the plea on direct appeal. CR 17.

The state filed a response and motion to dismiss. CR 38. A hearing and briefing followed. CR 44, Augmented Record Brief in Support of Motion for Summary Dismissal, filed 12/6/06; State's Second Brief in Support of Motion for Summary Dismissal, filed 12/22/06; Supplemental Memorandum in Opposition to Summary Disposition, filed 1/5/07.

Following the hearing, the District Court entered a memorandum opinion and a subsequent order dismissing the petition. CR 49, 60.

In the memorandum opinion, the Court stated that trial counsel had provided constitutionally deficient assistance when he failed to explain to his client the elements of the offense to which she was going to plead guilty. CR 54-55. However, the Court concluded that there was not prejudice because the only way the Court would have accepted the plea would have been if Ms Schoger had lied about her intent to control the methamphetamine. CR 56.

The Court also rejected the claim of ineffective assistance of appellate counsel for failing to raise the issue that the District Court erred in refusing to accept an *Alford* plea stating that given the language of *Alford* and the lack of any authority in support of the position that a court can abuse its discretion by refusing to accept a plea, Ms. Schoger would not have prevailed on appeal. CR 58-59.

The memorandum opinion did not directly address the claim that the District Court had abused its discretion in refusing to accept an *Alford* plea, although by determining that Ms. Schoger would not have prevailed on appeal on such a claim, the Court implicitly rejected the more direct claim that the Court had abused its discretion. CR 49.

III. ISSUES PRESENTED FOR REVIEW

A. Was dismissal of the claim of ineffective assistance of trial counsel improper given that there was a genuine question of material fact as to whether counsel's failure to advise his client of the elements of the charge was prejudicial?

B. Was dismissal of the claim that the District Court erred in refusing to accept the guilty plea improperly dismissed given that there is a right to plead guilty in Idaho?

C. Was the dismissal of the claim of ineffective assistance of appellate counsel improper given that there was a genuine question of material fact as to whether the failure of appellate counsel to raise issues related to the improper refusal of the guilty plea was prejudicial?

IV. ARGUMENT

A. Summary Dismissal was Inappropriate Because There was a Genuine Issue of Material Fact as to Whether Trial Counsel's Ineffective Assistance Resulted in Prejudice to Ms. Schoger

1. *Standard of Review*

An application for post-conviction relief is civil in nature. *Workman v. State,* 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Like a civil plaintiff, the applicant for post-conviction relief must eventually prove by a preponderance of evidence the allegations upon which the claim depends. *Id.* However, summary disposition is appropriate only if the applicant's evidence raises no genuine issue of material fact. I. C. § 19-4906(b)-(c). On review of a summary dismissal of a petition, the appellate court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions along with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party. *Gilpin-Grubb v. State,* 138 Idaho 76, 80, 57 P.3d 797, 791 (2002), *Workman v. State, supra.* When the alleged facts, even if true would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing. *Workman v. State, supra,* citing *Stuart v. State,* 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990). Allegations contained in the application are insufficient for granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law. *Workman v. State, supra.*

2. *Summary Dismissal of the Claim of Ineffective Assistance of Trial Counsel was Inappropriate*

As the District Court stated in its memorandum opinion, a claim of ineffective assistance of counsel may be properly brought in a post-conviction proceeding and the relevant rules are set

out in *State v. Matthews,* 133 Idaho 300, 986 P.2d 323 (1999):

> The benchmark for judging a claim of ineffective assistance of counsel is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The test for evaluating whether a criminal defendant has received the effective assistance of counsel is the two prong test found in *Strickland* [*v. Washington,* 426 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)]. Under this test, a petitioner must show both that: 1) his counsel's conduct was deficient because it fell outside the wide range of professional norms, and 2) the petitioner was prejudiced as a result of that deficient conduct.

CR 53.

Also, as found by the District Court, there was deficient performance by counsel. As stated by the District Court:

> A failure to advise a defendant of the elements of an offense to which he or she subsequently pleads guilty is an omission that does not fall within the wide range of professionally competent assistance, i.e., it is deficient performance. The determination whether this duty has been breached does not turn on whether the effort to plead guilty was successful. Accordingly, for purposes of the present motion, the Court concludes that Petitioner has adequately alleged deficient performance of trial counsel.

CR 55.

Where the District Court erred was in its conclusion that there was no genuine issue of material fact as to whether this deficient performance resulted in prejudice to Ms. Schoger. The District Court's analysis was:

> The 'prejudice' in this case was the Court's refusal to accept Petitioner's proffered plea of guilty. The only manner in which Petitioner's trial counsel could have changed the outcome would have been by persuading Petitioner to falsely testify as to the factual basis upon which the plea of guilty might have been accepted.

CR 56.

This analysis is incorrect.

In the Court's questioning of Ms. Schoger regarding the question of possession, the Court asked her, "Did you have the intention to exercise control over that [methamphetamine] in some fashion, to move it around or do something with it *at a later time*?" Tr. 10/7/04 p. 112 at CR 23A (emphasis added). The Court's second question was "Did you have the intention to exercise control over it?" Tr. 10/7/04 p. 114 at CR 24. Both of these questions could have logically been heard by Ms. Schoger to refer to her future intent with regard to the methamphetamine, not her past behavior. Yet, she could clearly have still been guilty of constructive possession in the past even if she had resolved to no longer do anything with the methamphetamine *at a later time.*

Had she been properly informed of the nature of constructive possession by counsel, she would have understood that guilt of constructive possession does not just extend to intentions as to the future, but also extends to acts and intentions in the past and she may well have answered the Court's questions differently and the Court would have then accepted her plea. This conclusion is supported by Mr. Barnum's comments to the Court wherein he stated:

> Judge, with regard to the methamphetamine that was in the house, primarily Mr. Davis was the person that was handling that methamphetamine. Ms. Schoger indicates that he would basically keep it hidden from Ms. Schoger. However, that she did reside in the residence and we strongly believe that the state is going to be able to prove constructive possession if this matter does proceed to trial.
>
> And so with regard to the quantity that is within the house, Ms. Schoger admits to constructively possessing that and would ask the court to continue to proceed forward with her plea in terms of the 200 grams or more.

Tr. 10/7/04 p. 112-113 at CR 23A-24.

By stating that Mr. Davis primarily handled the methamphetamine, counsel was indicating that Ms. Schoger also had, at times, access to the drug. Otherwise, counsel would have stated that Mr. Davis exclusively handled the methamphetamine. And, by stating that the

state could prove constructive possession and that Ms. Schoger was admitting to constructive possession, counsel was stating that there was a factual basis for the plea and that his client agreed to that factual basis.

Had Ms. Schoger been properly instructed in the finer points of constructive possession, she would have given different answers to the Court's questions. Had she given different answers, her plea would have been accepted and she would have been subjected to a five-year and $15,000 mandatory minimum sentence rather than the ten-year and $25,000 mandatory minimum. Contrary to the Court's analysis, it was not necessary for counsel to instruct Ms. Schoger to lie to the Court in order to have her plea accepted. Defense counsel and the state both believed that there was a factual basis for the plea. (The jury eventually unanimously agreed beyond a reasonable doubt.) Defense counsel, having conferred with his client, believed that she was admitting to constructive possession. The hitch in the proceedings came, not because Ms. Schoger had or made a valid claim of actual innocence. Rather, the hitch came because she did not understand the intricacies of constructive possession. That, combined with the Court's questions phrased in the future tense, led to a misunderstanding by the Court as to what Ms. Schoger was admitting. Had Ms. Schoger's counsel been effective, the misunderstanding would not have occurred and her plea would have been accepted.

Further, had the plea been accepted, there exists a reasonable probability that Ms. Schoger would not have been sentenced to a ten-year fixed term. At the sentencing hearing, the state recommended that the court only impose the mandatory minimum sentence of ten years fixed with an additional 10 years for a total of twenty years. Of course, had the guilty plea to the reduced charge been accepted, the state would have recommended that the five-year mandatory

minimum be imposed as part of the negotiated settlement between the parties. In addition, the state would have recommended that only the $15,000 mandatory minimum fine be imposed, instead of the $25,000 mandatory minimum fine which was eventually imposed. T #30407 (Attempted Change of Plea), pg. 95, ln. 15-23. And, it is highly probable that the sentencing judge would have followed the state's recommendations, especially since Ms. Schoger had no prior felony convictions. (While she had four misdemeanor convictions, two of them were for driver's license violations and the other two (a D.U.I in 1999 and a Domestic Assault/Battery in 1996) were not the types of offenses which would lead a judge to impose more than the recommended five year sentence.)

Because there remained a genuine question of material fact, the question of whether trial counsel's ineffective assistance resulted in prejudice to Ms. Schoger, the District Court erred in summarily dismissing her petition for post conviction relief.

B. Summary Dismissal Was Inappropriate Because the District Court Abused Its Discretion in Refusing to Accept Ms. Schoger's Guilty Plea

1. *Standard of Review*

The question of whether the District Court has discretion to refuse a knowing, voluntary, and intelligent guilty plea is a question of law over which this Court exercises free review. *State v. Yzaguirre,* 144 Idaho 471, 473, 163 P.3d 1183, 1186 (2007).

2. *The District Court did not have Discretion to Refuse Ms. Schoger's Plea*

The District Court refused to accept Ms. Schoger's guilty plea as an *Alford* plea. This was an abuse of discretion because the Idaho Criminal Rules create a right to enter a guilty plea. Summary dismissal of the petition for post-conviction relief was improper in light of this abuse

of discretion.

North Carolina v. Alford, supra, established that express admission of guilt is not constitutionally required for a valid guilty plea. A guilty plea supported by a factual basis may be accepted even when accompanied by the defendant's claim of innocence. *Alford* did not, however, hold that all constitutionally valid pleas must be accepted by trial courts.

> A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, *see Lynch v. Overholser,* 369 U.S. [705] at 719, 82 S. Ct. [1063] at 1072, 8 L.Ed.2d 211 (by implication), although the States may by statue or otherwise confer such a right. Likewise, the State may bar their courts from accepting guilty pleas from any defendants who assert their innocence. *Cf.* Fed.Rule Crim.Proc. 11, which gives a trial judge discretion to 'refuse to accept a plea of guilty * * *.' We need not delineate the scope of that discretion.

400 U.S. at 38, n. 11, 91 S. Ct. at 168, n. 11.

Since *Alford,* some state courts have found that state constitutions, statutes, and rules create a right to plead guilty. *See, State v. Martin,* 614 P.2d 164, 166 (Wash. 1980); *Graham v. Commonwealth,* 397 S.E.2d 270, 272 (Va. App. 1990); *State v. Peplow,* 36 P.3d 922, 931 (Mont. 2001). Likewise, the Ninth Circuit has determined that "a court must accept an unconditional guilty plea, so long as the Rule 11(b) requirements are met." *In re Vasquez-Ramirez,* 443 F.3d 692, 695-696 (9th Cir. 2006).

The Washington Supreme Court recognized a right to plead guilty based upon court rule and statute. The determinative language of the court rule, CrR 4.2(a) was language that described the types of pleas that could be entered. "A defendant may plead not guilty, not guilty by reason of insanity or guilty." The statutory language provided that in answer to the arraignment, the defendant "may move to set aside the indictment or information, or may demur

or plead to it . . ." Revised Code of Washington 10.40.060. 614 P.2d at 165-166. The Washington Court concluded that "[a]lthough the State appears to argue to the contrary, we have been informed of no statute or rule of court which grants a trial court authority to decline a plea of guilty made competently, knowingly, voluntarily, unconditionally, unequivocally and on advice of counsel." 614 P.3d at 166. *See also, State v. Ford,* 891 P.2d 712 (Wash. 1995). It should be noted that, unlike *Martin*, the state *wanted* Ms. Schoger to plead guilty. Thus, the Court stymied both the state's and the defendant's objectives by refusing the plea.

Like Washington, defendants in Virginia also have a right to plead guilty. The Virginia Constitution at Art. I, § 8 states in pertinent part: "In criminal cases, the accused may plead guilty." This language, the Virginia Court found, "states in clear and unambiguous terms that a criminal defendant may plead guilty." Finding no further limitation on the right to plead guilty in either the state statutes or court rules, the Virginia Court held that a criminal defendant has a right to plead guilty subject only to a determination that the waivers embodied in the plea are intelligently, knowingly and voluntarily made. *Graham v. Commonwealth, supra.*

Montana's Supreme Court found that state statutes confer a right to plead guilty on criminal defendants in *State v. Peplow, supra.* Section 46-12-204(1), Montana Code (1997) states in relevant part, "A defendant may plead guilty or not guilty." And, M.C. § 46-16-105 (1977) states that "[b]efore or during trial, a plea of guilty may be accepted." The *Peplow* court stated that a general principle of statutory construction provides that when the word "may" is used to confer power upon an "officer, court, or tribunal, and the public or a third person has an interest in the exercise of power, then the exercise of the power becomes imperative." *Peplow,* 36 P.3d at 931, *citing, Lamb v. Missoula Imports, Inc.* 748 P.2d 965, 968 (Mont. 1988). Based

upon this statutory language, *Peplow* holds that a court is mandated to accept a defendant's guilty plea, as long as the statutory requirements of voluntariness, intelligence, and factual basis for the plea are fulfilled. ("There is no limitation imposed upon a defendant's right to plead. Presumably, had the Legislature intended to require the consent of the court or State as a condition to a plea of guilty, it would have so stated.").

The Ninth Circuit has most recently addressed the question of whether a defendant has a right to plead guilty in *In re Vasquez-Ramirez, supra.* In *Vasquez-Ramirez*, a federal district court refused the guilty plea of Vasquez-Ramierz because the court was concerned about the sentencing consequences of the plea. Looking at Fed.R.Crim.P. 11, the Ninth Circuit concluded that while Rule 11(c) explicitly gives judges the discretion to reject certain kinds of plea agreements, Rule 11(a) does not grant any discretion to reject unconditional guilty pleas. Consequently, a court must accept an unconditional plea so long as the Rule 11(b) requirements are met.[2]

In Idaho, the acceptance of pleas is governed by Criminal Rule 11. Rule 11 states in relevant part:

> (a) Alternatives.
>
> (1) In General. A defendant may plead guilty or not guilty. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall direct the entry of a plea of not guilty.
>
> (2) Conditional pleas. With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving

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[2] Federal Rule 11(a)(1) provides: "A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere." In contrast, Idaho's Rule 11(a)(1) provides: A defendant may plead guilty or not guilty." It does not make any provision for requiring court approval for any sort of unconditional plea, *Alford*, nolo contendere, or otherwise.

in writing the right, on appeal from the judgment, to review any specified adverse ruling. . . .

. . .

Idaho Criminal Rule 11

The Rule goes on to set out the rules for acceptance of a plea of guilty in 11(c). Those rules include that the plea is voluntary, that the defendant was properly informed of the consequences of the plea, that the defendant was advised as to the rights waived by the plea, that the defendant was informed of the nature of the charge and matters regarding plea bargaining agreements. Nowhere does the rule provide discretion for a court to reject a guilty plea other than a conditional plea.

The language of Idaho's rule is identical to or analogous to the language that other states and the Ninth Circuit have found creates a right to plead guilty. Washington's rule states that a defendant may plead guilty. Washington CrR 4.2(a). Virginia's constitution provides that a defendant may plead guilty. Virginia Constitution, Art. I, § 8. Montana's statute states that a defendant may plead guilty. Section 46-12-204(1), MCA (1997). And, Federal Criminal Rule 11 provides that a defendant may plead guilty. Just as those authorities have been found to confer a right to plead guilty, so should Idaho's Rule 11 which states that a defendant may be held to confer a right to plead guilty.

Such a result would be in accord not only with the reasoning of these other state courts and the Ninth Circuit, but also with the rules of statutory construction as previously applied in Idaho.

Just as in Montana, in Idaho the rules of statutory construction provide that the word

"may" in a statute or rule is to be construed as mandatory when the public interest or individual rights so require. *Dana, Larson, Roubal and Associates v. Board of Commissioners,* 124 Idaho 794, 801, 864 P.2d 632, 639 (1993), *citing Malone v. Van Etten,* 67 Idaho 294, 301, 178 P.2d 382, 385 (1947) and *Shea v. Owyhee County,* 66 Idaho 159, 156 P.2d 331 (1945).

Moreover, Rule 11 does specifically give the district court the power to reject certain types of pleas, namely conditional pleas which are to be accepted with approval of the court. By creating this specific exception to the right of a defendant to plead guilty, the rule necessarily requires that in other cases the defendant does have the right to plead guilty. This is in accord with the well-established rule of statutory construction that inclusio unius est exclusio alterius (the inclusion of one thing is the exclusion of another). *Koon v. Bottolfsen*, 66 Idaho 771, 775, 169 P.2d 345, 346 (1946) (applying the maxim in the context of statutory construction); *Intermountain Gas Co. v. Industrial Indem. Co. of Idaho*, 125 Idaho 182, 186, 868 P.2d 510, 514 (Ct. App. 1994).

In addition, the public interest is served by finding a right to plead guilty as established in Rule 11. This case is an excellent example of this public interest. In this case, Ms. Schoger's attempts to plead guilty were rejected by the District Court in part because the District Court believed that it was thereby protecting her constitutional rights. The Court specifically noted that it did not want Ms. Schoger to waive her right to appeal the loss of her suppression motion. In "protecting" Ms. Schoger's rights, the Court, however well intentioned, sent Ms. Schoger, just as predicted by trial counsel, right into a conviction on a charge carrying a much higher mandatory minimum sentence. Ms. Schoger is the person who will be serving 10 years instead of five and paying $25,000 instead of $15,000, not the District Judge. She is the person who should have

made the decision whether she wanted to pursue an appeal on the suppression motion at the risk of five additional years of prison. It is not in any way in the public interest to set up a system whereby district court judges and not defendants determine whether and when to avoid risk of greater punishment by entering voluntary and constitutionally valid guilty pleas.

In Idaho, there is a right to plead guilty, as established in Criminal Rule 11. Given this right, the District Court had no authority to reject Ms. Schoger's guilty plea.[3] Therefore, summary dismissal of her petition for post-conviction relief on the claim that the District Court abused its discretion was error.

C. Summary Dismissal Was Inappropriate Because There Were Issues of Disputed Material Fact as to the Ineffective Assistance of Appellate Counsel Claim.

1. *Introduction*

In the event the Court finds that the guilty plea issue could have been raised on direct appeal and is therefore deemed to be forfeited in post-conviction proceedings, *see* I.C. 19-4901(b), Ms. Schoger was deprived of the effective assistance of appellate counsel.

Idaho Code § 19-852 gives a criminal defendant the right to be represented on any appeal. This right guarantees the right to effective assistance of counsel. *Hernandez v. State,* 127 Idaho 685, 687, 905 P.2d 86, 88 (1995). Further, the Due Process Clause of the Fourteenth Amendment requires states to ensure that an indigent appellant receive effective assistance of counsel on his first appeal of right from a judgment of conviction. *Evitts v. Lucey,* 469 U.S. 387,

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[3] It should be noted that Ms. Schoger is not arguing that the District Court could not have rejected an *Alford* plea had there not been a factual basis for the plea. However, where, as in this case, there clearly is a factual basis for the plea, as agreed to by both the defense and the prosecution, there is no discretion to refuse the plea.

396 (1985); *Aragon v. State,* 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988). The *Strickland* standard generally applies to claims of ineffective assistance of counsel on appeal. *See Roe v. Flores-Ortega,* 528 U.S. 470, 476-77 (2000).

As detailed below, it was objectively unreasonable for appellate counsel to fail to challenge the court's rejection of the guilty plea, which was the best claim on appeal. Ms. Schoger was prejudiced by the deficient performance because she would have only been sentenced to a lesser fine and fixed term of imprisonment.

2. *It Was Deficient Performance for Appellate Counsel to Fail to Challenge the Trial Court's Improper Rejection of the Guilty Plea.*

To show deficient performance, a petitioner must demonstrate that counsel's representation did not meet objective standards of competence. *Hayes v. State,* 143 Idaho 88, 92, 137 P.3d 475, 479 (Ct. App. 2006); *Bagshaw v. State*, 142 Idaho 34, 39, 121 P.3d 965, 969 (Ct. App. 2005). A defendant is entitled to the reasonably competent assistance of a diligent, conscientious advocate. *Huck v. State,* 124 Idaho 155, 157, 857 P.2d 634, 636 (Ct. App. 1993); *State v. Tucker*, 97 Idaho 4, 8, 539 P.2d 556, 560 (1975).

Appellate counsel is required to make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Jakoski v. State,* 136 Idaho 280, 285, 32 P.3d 672, 677 (Ct. App. 2001); *LaBelle v. State*, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App. 1997). While, as a general matter, courts will not attempt to second-guess counsel's strategic and tactical choices, *see State v. Elison*, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001), this rule does not apply to counsel's decisions that are the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Id.* A post-conviction

applicant can overcome the presumption of effective assistance by showing that the ignored issues are clearly stronger than those presented. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007), *rev. denied* September 14, 2007.

Appellate counsel's performance was deficient under *Strickland* because he failed to raise the best issue available on appeal. As the Pennsylvania Supreme Court has written:

> Where appellate counsel abandons a claim that was preserved below it is appropriate to inquire into the reason for that decision. While we recognize that counsel is not obligated to present on direct appeal every issue raised at trial, when a contention which is not patently frivolous is abandoned, the decision to do so must be justified by some reasonable basis intended to inure to the client's benefit.

Commonwealth v. Yocham, 375 A.2d 325, 328 (Pa. 1977); *see also Commonwealth v. Townsell*, 379 A.2d 98 (Pa. 1977) (although strategy of appellate counsel may warrant deliberate choice as to the manner, emphasis, and length of argument, complete disregard of an important issue cannot be ignored as a matter of strategy).

The omission of the rejected plea issue was deficient performance. The issue was preserved for appeal and there is no conceivable strategic reason for appellate counsel to fail to raise the issue. And, what is most important, the issue was meritorious while the sentencing issue which was actually raised on appeal was frivolous considering the ten-year fixed term was the lowest possible sentence which could be imposed after trial. Therefore, appellate counsel's failure to raise the best issue on appeal demonstrates that appellate counsel was neither diligent nor conscientious. There was simply no reason to fail to raise the issue with the best chance of success. In light of the above, there is at least a material issue of fact as to whether appellate

counsel's conduct fell below an objective standard of reasonableness and summary disposition was inappropriate.

3. *The Failure to Raise the Rejected Plea Issue Prejudiced Ms. Schoger.*

Further, it appears that Ms. Schoger is entitled to relief on this claim because she was prejudiced by appellate counsel's deficient performance. To meet the prejudice element, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Hayes v. State,* 143 Idaho 88, 92, 137 P.3d 475, 479 (Ct. App. 2006); *Bagshaw v. State*, 142 Idaho 34, 39, 121 P.3d 965, 969 (Ct. App. 2005). In this case, as explained above, this Court would have vacated the conviction and remanded the case for entry of a guilty plea to the reduced charge because the trial court had no authority to reject the voluntary, knowing and intelligently made plea to the reduced charge. And, the District Court would have imposed a lesser sentence upon remand.

Thus, there is at least a material question of fact as to whether Ms. Schoger was prejudiced by appellate counsel's failure to raise the issue on appeal and the petition should not have been summarily dismissed.

V. CONCLUSION

In light of the above, Ms. Schoger respectfully asks that this Court reverse the district court's order summarily dismissing her petition for post-conviction relief and remand for further proceedings.

Respectfully submitted this 17th day of January, 2008.

Dennis Benjamin
Attorney for Shey Marie Schoger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 2008, I caused two true and correct copies of the foregoing to be mailed to:

Office of the Attorney General
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Dennis Benjamin